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No. _____

IN THE

Supreme Court of the United States

October Term, 2000

WALTER S. STEVENSON,
United States Navy (Retired),
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

On Petition for Writ of Certiorari to the
United States Court of Appeals for the Armed Forces

PETITION FOR WRIT OF CERTIORARI

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56 pp

QUESTION PRESENTED

Whether the military can suspend a retired servicemember's Fourth Amendment rights by conducting non-probable cause searches and seizures of his blood for DNA analysis based solely on the existence of personal jurisdiction?

TABLE OF CONTENTS

Page

Opinions Below 1

Jurisdiction 2

Constitutional Provision and Military Rule of Evidence Involved 2

Statement of the Case 2

I. Facts 2

II. Proceedings Below 4

Reasons for Granting the Petition 7

I. Retired Members of the Armed Forces Do Not Forfeit Their Fourth Amendment Rights by Becoming Disabled During Their Period of Service and Receiving Pay and Medical Benefits 7

II. The Military Does Not Have a Legitimate Interest that Is Sufficiently Vital to Conduct a Non-Probable Cause Search and Seizure of Petitioner's Blood for DNA Analysis 9

A. The military lacks a vital interest to conduct a non-probable cause seizure of a retired member's blood under Mil. R. Evid. 312(f) 11

B. Even if this Court finds a vital military healthcare need to seize Petitioner's blood, that need does not extend to a search for DNA evidence and it does not outweigh his substantial right to privacy 16

Conclusion 16

Appendix A 1a

Appendix B 10a

Appendix C 23a

Appendix D 34a

TABLE OF AUTHORITIES

Cases

United States Supreme Court

Arizona v. Hicks,
480 U.S. 321 (1987) 9-10, 13

Burns v. Wilson,
346 U.S. 137 (1953) 7

California v. Stewart (decided with *Miranda v. Arizona*,
384 U.S. 436 (1966) 16-17

Chandler v. Miller,
520 U.S. 305 (1997) 8, 10-11, 12, 15

National Treasury Employees Union v. Von Raab,
489 U.S. 656 (1989) 7-8, 10, 11

Olmstead v. United States,
277 U.S. 438 (1928) 14-15

Parker v. Levy,
417 U.S. 733 (1974) 7

Skinner v. Railway Labor Executives' Ass'n,
489 U.S. 602 (1989) 9, 10, 11, 13, 14

Solorio v. United States,
483 U.S. 435 (1987) 8

Toth v. Quarles,
350 U.S. 11 (1955) 8, 11

Vernonia School Dist. v. Acton,
515 U.S. 646 (1995) 10, 14

Federal Courts

Akol v. United States,
167 Ct. Cl. 99 (1964) 12

Committee for GI Rights v. Callaway,
518 F.2d 466 (D.C. Cir. 1975) 7

Norman-Bloodsaw v. Lawrence Berkeley Lab.,
135 F.3d 1260 (9th Cir. 1998) 14

United States v. Nicolosi,
885 F. Supp. 50 (E.D.N.Y. 1995) 14

Military Courts

Murray v. Haldeman,
16 M.J. 74 (C.M.A. 1983) 7
United States v. Bickel,
30 M.J. 277 (C.M.A. 1990) 9, 11
United States v. Bowie,
14 U.S.C.M.A. 631, 34 C.M.R. 411 (1964) 8
United States v. Middleton,
10 M.J. 123 (C.M.A. 1981) 9

Statutes

10 U.S.C. § 867 16

10 U.S.C. § 1074 12

28 U.S.C. § 1259 15-16

Miscellany

Department of Defense Directive 5154.24(28 Dec 1996)..... 13

Mil. R. Evid. 312(f) ..... *passim*

Naval Medical Command Instruction 6320.3b 12

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PETITION FOR WRIT OF CERTIORARI

Walter S. Stevenson, United States Navy (retired), petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Armed Forces.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Armed Forces, *United States v. Stevenson*, 53 M.J. 257 (2000), is located in Appendix A at 1a-9a. The opinion of the Navy-Marine Corps Court of Criminal Appeals, *United States v. Stevenson*, 52 M.J. 504 (N.M. Ct. Crim. App. 1999), is located in Appendix B at 10a-22a. The unpublished order of the trial judge is located in Appendix C at 23a-33a.

JURISDICTION

The lower court entered its judgment on August 2, 2000. Petitioner filed a timely petition for reconsideration, which was denied on August 31, 2000. App. D. at 34a. This Court's jurisdiction is invoked under 28 U.S.C. § 1259(2).

CONSTITUTIONAL PROVISION AND MILITARY RULE OF EVIDENCE INVOLVED

The Fourth Amendment to the United States Constitution provides, in relevant part:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated. . . .

Military Rule of Evidence 312(f) provides:

> Nothing in this rule shall be deemed to interfere with the lawful authority of the armed forces to take whatever action may be necessary to preserve the health of a servicemember. Evidence or contraband obtained from an examination or intrusion conducted for a valid medical purpose may be seized and is not evidence obtained from an unlawful search or seizure within the meaning of Mil. R. Evid. 311.

STATEMENT OF THE CASE

I. Facts

Naval Criminal Investigative Service [NCIS] targeted Petitioner as a possible suspect in November 1997 for the 1992 rape of a military dependent in Hawaii. The agency's suspicion rested on a Pearl Harbor police report that listed him as a possible "peeping Tom" suspect. This incident occurred five months prior to the rape and in an area near

the victim's house. NCIS also knew that Petitioner was an active duty Sailor stationed in Hawaii in 1992. He had since been placed on the temporary disabled retired list [TDRL][1] in 1994 for schizophrenia. He lived in Tennessee.

Agents from the NCIS office in Hawaii contacted Special Agent John McNutt in Memphis, Tennessee. They asked him to interrogate Petitioner and request a sample of his blood for deoxyribonucleic acid [DNA] testing. Special Agent McNutt began by reviewing Petitioner's medical records. These records indicated that he suffered from schizophrenia and diabetes. The diabetes required him to have weekly screenings for blood-sugar levels at the Veterans Administration [VA] hospital in Memphis, Tennessee. Special Agent McNutt relayed this information to NCIS headquarters.

After reviewing the information, NCIS headquarters advised Special Agent McNutt not to have direct contact with Petitioner because of his psychosis. Instead, the agency wanted him to verify Petitioner's blood type. When this information did not eliminate him as a suspect, Special Agent McNutt called the VA Regional Counsel, Ron Dooley, to discuss the possibility of obtaining a blood sample for DNA testing of a possible rape suspect. Mr.

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[1] Members of the TDRL are servicemembers with disabilities "not yet determined to be stabilized or permanent." App. 4a. They receive retirement pay and medical benefits. *Id.* In return, members must maintain a current address with the Retired Pay Department of an appropriate Finance Center, and they must undergo physical examinations every eighteen months to ensure continued disability. App. 20a. A failure to report to the physical, however, does not result in punitive action. App. 20a-21a The Navy may suspend retirement pay, and if noncompliance continues, it may administratively separate the member from the naval service. App. 21a. Finally, if the disability subsides within five years, the TDRL member may reenlist if otherwise qualified. App. 4a, 21a. He cannot be forced into active duty service. App. 6a, 21a.

Dooley replied that the hospital often gave blood samples to law enforcement for driving under the influence cases. Special Agent McNutt simply needed to request the blood in a memorandum. He filed this request on May 21, 1998.

On June 3, 1998, Petitioner went to the VA hospital in Memphis for his weekly diabetes test. The sole purpose of this visit was to monitor his blood-sugar levels. Hospital staff, acting in part on NCIS's request, extracted two vials of blood. One vial was for Petitioner's diabetes screening and the second was for DNA testing by NCIS. At no time was Petitioner informed of, nor did he consent to, the use of his blood for DNA analysis. The government also conceded that NCIS did not have probable cause or seek a search warrant. App. 26a.

Special Agent Gail Beasely received the second vial of blood that afternoon. She sent it to the United States Criminal Investigation Laboratory for DNA matching. Petitioner's sample allegedly matched the DNA from the victim's rape kit.

II. Proceedings Below

The United States Navy charged Petitioner with one specification of rape in violation of Article 120, Uniform Code of Military Justice [UCMJ], 10 U.S.C. § 920. Petitioner subsequently filed a motion to suppress blood and DNA evidence on March 18, 1999. The motion challenged the legality of the search and seizure of his blood under the Fourth and Fifth Amendments.

The trial judge agreed with Petitioner and suppressed the blood and DNA evidence. The judge noted, and the government conceded, that there was no probable cause or a search warrant. App. 26a. The only basis offered by the government for admissibility was Military Rule of Evidence [Mil. R. Evid.] 312(f). App. 28a. The judge rejected that argument. He concluded that the application of Mil. R.

Evid. 312(f) would violate the Fourth and Fifth Amendments. App. 32a-33a. He opined that the rule "should be narrowly construed to apply only to members of the 'active duty' armed forces." App. 30. Moreover, he stated that the search and seizure of DNA was an attempt by the government to bootstrap inadmissible evidence "onto a valid medical procedure in an attempt to make lawful that which would not otherwise standing alone be lawful." App. 31a.

The government appealed the court-martial judge's decision to the Navy-Marine Corps Court of Criminal Appeals. *See* Art. 62(a)(1)(B) and (a)(2), UCMJ, 10 U.S.C. § 862(a)(1)(B) and (a)(2). That court affirmed the trial judge's decision on October 18, 1999. Although the court did not find a Fifth Amendment violation, it did find a Fourth Amendment violation in the application of Mil. R. Evid. 312(f) to Petitioner. See App. 21a. Like the proceedings below, this rule was the only offered basis for admitting the evidence. App. 18a. The court also concluded that there was no probable cause or a search warrant in the case. App. 14a.

In applying Mil. R. Evid. 312(f), the court noted that members of the TDRL are retirees with medical disabilities. App. 20a. The armed forces do not rely upon these members to fulfill its mission, and thus, it does not have the same need to preserve their health for mission readiness. App. 21a. Under these circumstances, "there [was] no showing that the application of Mil. R. Evid. 312(f) to members of the TDRL [was] a needed exception to the Fourth Amendment protections applicable to the general populace based upon military exigencies." *Id.*

The Judge Advocate General of the Navy, acting pursuant to Art. 67(a)(2), UCMJ, 10 U.S.C. § 867(a)(2), certified this case to the United States Court of Appeals for the Armed Forces on December 28, 1999. The certification

asked two questions: (1) whether Mil. R. Evid. 312(f) was applicable to members of the TDRL; and (2) whether the sample taken in this case was admissible under the rule. App. 2a.

The court reversed the decisions of the Navy-Marine Corps Court of Criminal Appeals and the military judge on August 2, 2000. In addressing the first issue, the court rejected the contention that the military lacked special needs to apply Mil. R. Evid. 312(f) to retired military personnel. App. 6a-7a. It stated that the existence of court-martial jurisdiction alone was sufficient for the rule's application. App. 6a-7a. As for issue two, the court held that once the blood was withdrawn pursuant to Mil. R. Evid. 312(f), any evidence gained from the initial intrusion was admissible. App. 8a. The only question was whether the prolonged insertion of the needle was of a "*de minimus*" nature under the Fourth Amendment. *Id.* The court remanded the case to the trial judge for this determination. App. 9a.

REASONS FOR GRANTING THE PETITION

The lower court's decision in this case gutted any reasonable expectation of privacy that retired military members had in their person. The court said that Mil. R. Evid. 312(f), which purports to allow non-probable cause searches and seizures of body fluid for valid medical purposes, applied without regard to the member's retired status or the non-healthcare related nature of a subsequent search. The application of Mil. R. Evid. 312(f) only required personal jurisdiction and an initial medical purpose for inserting the needle. This holding ignores Petitioner's Fourth Amendment right to be secure in his person against unreasonable searches and seizures.

I. Retired Members of the Armed Forces Do Not Forfeit Their Fourth Amendment Rights by Becoming Disabled During Their Period of Service and Receiving Pay and Medical Benefits.

It is well-established that Congress and the President are entitled to deference in their rulemaking decisions regarding the military. *See Parker v. Levy*, 417 U.S. 733, 756 (1974). This deference, however, does not permit a blind application of the President's rules. *See Burns v. Wilson*, 346 U.S. 137, 142 (1953) (military courts must examine a military member's constitutional claims). In the context of the Fourth Amendment, courts must examine the intrusion in light of military special needs or the "exigencies of military necessity and unique conditions that may exist within the military society." *Murray v. Haldeman*, 16 M.J. 74, 81 (C.M.A. 1983) (quotations and internal quotation marks omitted); *Committee for GI Rights v. Callaway*, 518 F.2d 466 (D.C. Cir. 1975) (applying a Fourth Amendment "special needs" test to the military's compulsory urinalysis program); *see also National Treasury Employees Union v. Von Raab*, 489 U.S. 656, 671-72 (1989) (in dicta, this Court said that some suspicionless intrusions

of military members are reasonable in light of military special needs).

The lower court chose not to analyze Petitioner's case under a Fourth Amendment framework. It held that the mere existence of court-martial jurisdiction allowed the application of Mil. R. Evid. 312(f). App. 7a. This decision not only ignores Petitioner's Fourth Amendment rights, it misconstrues obvious differences between jurisprudence regarding court-martial jurisdiction and that regarding Fourth Amendment violations.

Court-martial jurisdiction is based on the unilateral interests of the military to prosecute its servicemembers. It is a question "of *status*, namely, whether the accused in the court-martial proceeding is a person who can be regarded as falling within the term 'land and navy Forces.' " *Solorio v. United States*, 483 U.S. 435, 439 (1987) (quoting *Kinsella v. Singleton*, 361 U.S. 234, 240-41 (1960) (emphasis in original)); *Toth v. Quarles*, 350 U.S. 11, 16-17 (1955) (court-martial jurisdiction does not reach veterans without present contacts with the military). Such minimum contacts as a veteran's receipt of pay and medical benefits are sufficient to establish *in personam* jurisdiction. *See United States v. Bowie*, 14 U.S.C.M.A. 631, 34 C.M.R. 411 (1964) (members of the TDRL are subject to jurisdiction because they receive pay and medical benefits).

The existence of these minimum contacts, however, does not make an intrusion constitutional *per se*. Fourth Amendment analysis, unlike the military's interest in retaining jurisdiction, requires courts to weigh the interests of both parties. They must conduct "a context-specific inquiry, examining closely the competing private and public interests advanced by the parties." *Chandler v. Miller*, 520 U.S. 305, 314 (1997) (citations omitted). A person's "status" in the military admittedly plays an important role in this regard, but it is not outcome

determinative. On the contrary, in cases such as this one, the person's status as a retiree lessens the military's need to conduct non-probable cause searches and seizures because of the non-existent role such members have in the military's mission.

The Court of Appeals for the Armed Forces ignored these distinctions when it concluded that court-martial jurisdiction alone permitted the intrusion in this case. This reliance represents a blind application of the President's rules—that is, if the President has the power to court-martial a person, then Military Rule of Evidence 312(f) applies irrespective of that person's constitutional rights. Such a conclusion leads to absurd results in this case, as well as other cases wherein the Fourth Amendment rights of a retiree are in question. The court's rationale would allow the military's use of drug-detection dogs in retirees' homes, *see United States v. Middleton*, 10 M.J. 123, 126-32 (C.M.A. 1981), or it would subject them to compulsory urinalysis. *See United States v. Bickel*, 30 M.J. 277, 280-86 (C.M.A. 1990). This result is not reasonable under any constitutional interpretation of the word, and it requires this Court to grant certiorari to ensure that millions of military retirees are protected from unreasonable searches and seizures by the military.

II. The Military Does Not Have a Legitimate Interest that Is Sufficiently Vital to Conduct a Non-Probable Cause Search and Seizure of Petitioner's Blood for DNA Analysis.

This Court has repeatedly held that Fourth Amendment privacy interests exist at several levels. *See Skinner v. Railway Labor Executives' Ass'n*, 489 U.S. 602, 616 (1989). The first level of search occurs when the needle penetrates the skin. *Id.* The second involves "[t]he ensuing chemical analysis of the sample to obtain physiological data." *Id.* (citing *Arizona v. Hicks*, 480 U.S. 321, 324-25 (1987)). As

with any search, a reasonable secondary search generally requires a search warrant issued on probable cause. *See Hicks*, 480 U.S. at 324-25.

This is not to say that all non-probable cause searches and seizures are unreasonable *per se*. *See Skinner*, 489 U.S. at 624. In extraordinary circumstances, such intrusions may be permissible when the government demonstrates "special needs, beyond the normal need for law enforcement." *Chandler*, 520 U.S. at 313-14 (quoting *Skinner*, 489 U.S. at 619) (internal quotation marks omitted). The need must be substantial "enough to override the individual's acknowledged privacy interest, sufficiently vital to suppress the Fourth Amendment's normal requirement of individualized suspicion." *Id.* at 318. Courts must balance "the individual's privacy expectations against the Government's interest to determine whether it is impractical to require a warrant or some level of individualized suspicion in the particular context." *Von Raab*, 489 U.S. at 665-66 (citation omitted). In the context of criminal cases, courts generally side with an individual's privacy interests and require warrants based on probable cause. *Vernonia School Dist. v. Acton*, 515 U.S. 646, 653 (1995) (citation omitted); *Skinner*, 489 U.S. at 619 (citations omitted).

A. The military lacks a vital interest to conduct a non-probable cause seizure of a retired member's blood under Mil. R. Evid. 312(f).

In reversing the suppression motion, the court below held that the existence of jurisdiction over members of the TDRL showed a continued military status and an interest in the member's "fitness for duty." App. 6a. This interest in fitness for duty, in turn, permitted the constitutional use of the "valid medical purpose" exception embodied in Mil. R. Evid. 312(f). App. 7. Contrary to the court's assertion, this purported interest "is 'symbolic,' not 'special,' as that

term draws meaning from [this Court's] case law." *Chandler*, 520 U.S. at 322.

A military member's "fitness for duty", or his health under Mil. R. Evid. 312(f), is not the primary concern of the military. These concerns are "merely incidental" to the military's primary mission of fighting or being "ready to fight wars should the occasion arise." *Toth*, 350 U.S. at 17 (disciplining personnel is merely incidental to the military's primary mission). It is this relationship between the military's primary mission—*i.e.*, fighting wars—and the means necessary to achieve that mission—*i.e.*, a member's fitness for duty—that establishes whether the alleged special need is sufficiently vital to overcome a person's acknowledge privacy interest. *See Skinner*, 489 U.S. at 627-28 (railroad's primary goal of safety is furthered by the fitness of employees who work in safety-sensitive jobs); *Von Raab*, 489 U.S. at 669-70, 678 (treasury employees' relationship with drug interdiction, weapons, or classified information allows for drug testing); *Bickel*, 30 M.J. at 282-83 (broad rules allowing drug testing of active duty personnel are permissible because a member in a "routine job may be called on short notice to perform a more typically 'military' task."). Thus, the question in this case is whether a physically fit Petitioner, as a member of the TDRL, affects the military's primary mission of national defense.

Here, Petitioner's health or "fitness for duty" does not affect the military's mission. Petitioner, as a member of the TDRL, is a retiree who has a "may be" permanent medical condition preventing him from continued military service. App. 7a, 21a. Unlike active duty members, whose physical and mental health must be maintained for military readiness, he cannot "be called on short notice." *See Bickel*, 30 M.J. at 282-83. In fact, Petitioner cannot be forcibly recalled to active duty service, save a national emergency. App. 7a, 21a. It strains logic to assert, as did the lower

court, that the military relies upon a person who cannot be forced into service outside a declaration of war. *See* App. 7a (citing *Akol v. United States*, 167 Ct. Cl. 99 (1964) (discussing the recall of a disabled retiree due to manpower shortages six months after the bombing of Pearl Harbor)). Such speculative possible service does not show a vital interest.

The military's non-reliance on members of the TDRL is further evident by Congress's secondary concern for their health. Section 1074(a) of Title 10 states that active duty members cannot be denied hospital care at military hospitals. Retired members, on the other hand, are treated "subject to the availability of space and facilities and the capabilities of the medical and dental staff."[2] 10 U.S.C. § 1074(b). This contingent status demonstrates that an active duty member's health takes priority over a retiree's health. The distinction is logical—a healthy active duty member is necessary to fulfill the military's mission on short notice, and thus deserves priority in medical case. A retiree, on the other hand, is not expected to fulfill any immediate need of the military. His or her health can wait.

Ultimately, Petitioner's non-amenability to recall and his status as a second class healthcare recipient do not demonstrate a person relied upon by the military to fulfill its mission. Without this connection, the military's

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[2] Although now obsolete because of the military's implementation of TRICARE, see 10 U.S.C. § 1086, naval health care policies further demonstrate that the military's non-reliance on TDRL members in fulfilling its mission. Naval Medical Command Instruction [NAVMEDCOMINST] 6320.3b, ¶ A-3b, lists retirees, including members of the TDRL, as a fourth-tier priority. If a military hospital has limited space, retirees receive medical treatment after active duty members, members of the Senior Reserve Officers' Training Corps and civilian dependents of active duty members. Only civilian employees of the federal government and "all others" entitled to military medical care are lower on the list. *Id.*

concern for his health is merely "symbolic" because it does not serve its primary mission. *See Chandler*, 520 U.S. at 322. As such, the government cannot claim that it has a sufficiently vital interest under Mil. R. Evid. 312(f) to allow NCIS to seize Petitioner's blood.

B. Even if this Court finds a vital military healthcare need to seize Petitioner's blood, that need does not extend to a search for DNA evidence and it does not outweigh his substantial right to privacy.

Even if Military Rule of Evidence 312(f) creates a special need for preserving a retired servicemember's health, testing for DNA is unrelated to any plausible health care objectives of the military. *See Hicks*, 480 U.S. at 324-25. DNA data is not necessary to preserve health, and it does not disclose any information of immediate benefit to doctors. In fact, the only military organization authorized to collect and store DNA information is the Armed Forces Institute of Pathology [AFIP]. Department of Defense Directive 5154.24 at ¶ 5 (28 Dec 1996). In cases of criminal prosecution, AFIP can release information from its DNA databases only if "the responsible DoD official has received a proper judicial order or authorization." *Id.* at ¶ 5a(4)(a). The lower court decision makes these regulations meaningless. According to the court, once the blood is obtained Mil. R. Evid. 312(f) does not prohibit a subsequent search for DNA. App. 8a.

Moreover, the government suffers no loss, beyond that of criminal investigation, to justify their intrusion into Petitioner's privacy. *Cf. Skinner*, 489 U.S. at 628-32 (Federal Railroad Administration needed drug testing program, in part, to act as a deterrent, protect public safety, and avoid deterioration of evidence). DNA evidence is not evanescent, and waiting for a search warrant will not impede or prevent further investigations. Under these

circumstances, the military cannot demonstrate a compelling interest to search and seize Petitioner's blood for DNA analysis.

On the other hand, it is incontrovertible that Petitioner has a significant privacy interest in his blood and the information contained therein. This Court has said on numerous occasions that blood "can reveal a host of private medical facts about an employee, including whether he or she is epileptic, pregnant, or diabetic." *Skinner*, 489 U.S. at 617; *see also Acton*, 515 U.S. at 658 (noting under Fourth Amendment analysis that "it is significant that the tests at issue here look only for drugs, and not for whether the student is, for example, epileptic, pregnant, or diabetic"). It also "reveal[s] a range of genetic identity features as well as the presence of chemicals within one's system." *United States v. Nicolosi*, 885 F. Supp. 50, 55 (E.D.N.Y. 1995) (collection of saliva without a warrant violates the Fourth Amendment). As the Ninth Circuit emphasized, "few subject areas [are] more personal and more likely to implicate privacy interests than that of one's health or genetic make-up." *Norman-Bloodsaw v. Lawrence Berkeley Lab.*, 135 F.3d 1260, 1268 (9th Cir. 1998) (citing *Doe v. City of New York*, 15 F.3d 265, 267 (2d Cir. 1994)).

On balance, the military cannot demonstrate a vital interest that overcomes Petitioner's substantial privacy interests. NCIS's collection of Petitioner's blood and the subsequent search for DNA is an attempt to conduct criminal investigations in disregard of his substantial privacy rights. This intrusion cannot be tolerated. As Justice Brandeis said, in *Olmstead v. United States*, 277 U.S. 438 (1928):

> It is . . . immaterial that the intrusion was in aid of law enforcement. Experience should teach us to be most on our guard to protect liberty when the Government's purposes are beneficent. Men born

> to freedom are naturally alert to repel invasion of their liberty by evil-minded rulers. The greatest dangers to liberty lurk in insidious encroachment by men of zeal, well-meaning but without understanding.

Olmstead, 277 U.S. at 479.

NCIS's conduct, although made in an attempt to solve crimes, infringes on privacy rights fundamental to the United States and the armed forces, the very organization that protects these rights. Because such conduct is intolerable in a free society, this Court should grant certiorari to ensure that military retirees, such as Petitioner, are not subjected to unreasonable searches and seizures.

CONCLUSION

As demonstrated *supra*, the decision by the Court of Appeals for the Armed Forces' abrogated any reasonable expectation of privacy that retired servicemembers had in their body fluids. The court concluded that the mere existence of personal jurisdiction allowed the military to search and seize a retiree's blood for the sole purpose of prosecution, so long as the initial needle penetration was done for valid medical purposes. Thereafter, once the blood was obtained, military officials could conduct any search or chemical analysis of that blood. These radical departures from the "special needs" doctrine is entirely inconsistent with the Court's Fourth Amendment jurisprudence and, if allowed to stand, effectively eviscerates all retired military members' right to privacy. For this reason alone, this Court should grant this writ of certiorari to ensure that other retirees' are not subjected to Fourth Amendment violations.

Moreover, this Court's failure to grant review now will prevent Petitioner from later redress of these Fourth Amendment violations. Under Section 1259 of Title 28, this court's jurisdiction to review decisions by the Court of rAppeals for the Armed Forces is limited to cases reviewed by that court under Section 867(a) of Title 10. *See* S. Rep. No. 53, 98th Cong., 1st Sess. 11 (1983). In non-capital cases, the court reviews cases at its discretion, *see* 10 U.S.C. § 867(a)(3), or pursuant to a request by a Judge Advocate General. *See* 10 U.S.C. § 867(a)(2). Here, the court reviewed this case pursuant to a request by the Judge Advocate General of the Navy. It issued a final decision with regards to Petitioner's Fourth Amendment claims. Thus, if convicted, Petitioner's only chance of having this issue reviewed is if the Court of Appeals for the Armed Forces grants discretionary review to re-review his claims. Such a possibility is remote at best, and thus, serves as a basis for this Court granting his petitioner for writ of certiorari. *See*

California v. Stewart (decided with *Miranda v. Arizona*, 384 U.S. 436, 498 n.71 (1966) (a decision by the state's highest court is final if it prevents a party from later review of the issue.).

Petitioner respectfully requests this Court grant his petitioner for writ of certiorari.

Respectfully submitted,

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November 2000

Appendix A

UNITED STATES, *Appellant*,

v.

Walter S. STEVENSON, Hospital Corpsman Third Class, U.S. Navy, *Appellee*.

No. 00-6001

Crim. App. No. 99-0769

United States Court of Appeals for the Armed Forces

Argued May 2, 2000
Decided August 2, 2000

EFFRON, J., delivered the opinion of the Court, in which CRAWFORD, C.J., SULLIVAN and GIERKE, JJ., and COX, S.J., joined.

Counsel

For Appellant: *Lieutenant Timothy E. Curley*, JAGC, USNR (argued); *Colonel Kevin M. Sandkuhler*, USMC, and *Commander Eugene E. Irvin*, JAGC, USN (on brief).

For Appellee: *Lieutenant M. Eric Eversole*, JAGC, USNR (argued); *Lieutenant Omar R. Lopez*, JAGC, USNR (on brief).

Military Judge: Raymond J. Kreichelt

Judge EFFRON delivered the opinion of the Court.

Following arraignment at a general court-martial on a charge of rape, see Art. 120, Uniform Code of Military Justice, 10 USC § 920, appellee moved to suppress DNA evidence obtained from a vial of his blood. The military judge granted the motion, the Government appealed under Article 62(a)(1)(B) and (a)(2), UCMJ, 10 USC § 862(a)(1)(B) and (a)(2), and the Court of Criminal Appeals affirmed the ruling of the

military judge. 52 M.J. 504 (1999). Thereafter, the Judge Advocate General certified the case to this Court, see Art. 67(a)(2), UCMJ, 10 USC § 867(a)(2), asking us to address the following issues:

> I. WHETHER MILITARY RULE OF EVIDENCE 312(f) IS APPLICABLE TO MEMBERS OF THE TEMPORARY DISABILITY RETIRED LIST.
>
> II. IF MILITARY RULE OF EVIDENCE 312(f) APPLIES TO APPELLEE, WHETHER THE SAMPLE OF HIS BLOOD SEIZED DURING A MEDICAL PROCEDURE IS ADMISSIBLE UNDER MIL.R.EVID. 312(f).

For the reasons set forth below, we answer the first question in the affirmative. We return this case for consideration of the issues raised by the second question, in light of our opinion, during further court-martial proceedings.

I. BACKGROUND

In November 1997, Naval Criminal Investigative Service (NCIS) investigators determined that appellee was a possible suspect in a November 1992 rape of a military dependent in Hawaii, where appellee had been stationed. At that time, appellee was assigned to the temporary disability retired list (TDRL), see Part II, infra, and was being treated for diabetes at the Veterans Administration (VA) hospital in Memphis, Tennessee.

During the investigation, the NCIS sought to obtain a sample of appellee's blood for purposes of making a DNA comparison between his blood and the samples of blood and semen gathered at the time of the crime. The NCIS asked the VA hospital to obtain a blood sample from appellee the next time he presented himself for a physical examination in which a blood sample would be taken during the normal course of his treatment.

According to the stipulation of fact agreed to by both parties at trial:

> On 3 June 1998, blood was drawn from Stevenson by staff of the VA Hospital in Memphis, TN. This was accomplished by inserting one vacuum needle (with an open end) into Stevenson's arm. While this needle was in his arm, one tube of blood was drawn for treatment and diagnosis of his diabetes. Within five or six seconds after the first tube was withdrawn from the needle, hospital staff inserted a second tube in order to obtain a separate blood sample for NCIS. When the second tube was filled and withdrawn, hospital staff withdrew the needle out of Stevenson's arm. The needle was in Stevenson's arm during the entire time both tubes were filled.

The findings of fact by the military judge added:

> The initial tube of blood drawn on 3 June 1998 occurred during a normally scheduled medical visit and was drawn for medical purposes to monitor the accused's diabetes.
>
> The second tube of blood drawn on 3 June 1998 was drawn solely for law enforcement purposes at the request of NCIS and was not drawn for any medical purpose.
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> * * *
>
> The VA hospital staff obtained the accused's consent to draw blood for medical purposes. The VA hospital staff did not, however, tell the accused that a second tube of blood would be drawn solely for forensic purposes for use in the [rape] investigation, nor did he give consent for a second tube of blood to be drawn for that purpose.

II. THE TEMPORARY DISABILITY RETIRED LIST

If a servicemember while on active duty becomes disabled, the Service Secretary may retire the member with pay, subject to detailed statutory and regulatory procedures. These procedures provide two basic types of disability retirement -- permanent and temporary. When there is a determination that a disability is "permanent . . . and stable," the Service Secretary may retire the member with pay. 10 USC § 1201. If, however, the disability "may be of a permanent nature," but the circumstances do not permit a final determination that the condition is, in fact, "permanent . . . and stable," the Secretary is required to place the member on the "temporary disability retired list, with retired pay." 10 USC § 1202.

While on the TDRL, a member is required to submit to periodic physical examinations "to determine whether there has been a change in the disability for which he was temporarily retired." Failure to submit to such a periodic examination may lead to termination of retired pay. 10 USC § 1210(a).

When a periodic examination leads to a determination that the member is "physically fit" to perform his or her duties, there are a number of options. The member may be returned to active duty with his or her consent, retired if otherwise eligible for retirement, discharged, or transferred to the inactive reserves. If the member does not consent to a proposed return to active duty, "his status on the temporary disability retired list and his disability retired pay shall be terminated as soon as practicable and the member shall be discharged." 10 USC § 1211(c).

If a member remains on the TDRL for 5 years, the Secretary is required to make a final determination. If there is a determination that the disability "still exists," it is considered at that point to be "permanent . . . and stable," and the member is retired. 10 USC § 1210. If the member is determined to be fit for duty, the service has the same options as when such a

determination is the result of a periodic examination: return to active duty with consent, retirement if otherwise eligible, discharge, or transfer to the inactive reserves.

In United States v. Bowie, 14 U.S.C.M.A. 631, 34 C.M.R 411 (1964), our Court held that members on the TDRL are subject to court-martial jurisdiction under Article 2, which includes jurisdiction over retired members who are entitled to pay. See Art. 2(a)(4), UCMJ, 10 USC § 802(a)(4). We specifically noted the potential for recalling persons on the TDRL to active duty, particularly in times of national need. 14 U.S.C.M.A. at 632, 34 C.M.R. at 412.

III. DISCUSSION

A. Applicability of Mil. R. Evid. 312(f) to Members on the TDRL

At trial and on appeal, the Government has relied on Mil. R. Evid. 312(f), Manual for Courts-Martial, United States (1998 ed.), which provides:

> Nothing in this rule [dealing with admissibility of evidence obtained from "body views and intrusions"] shall be deemed to interfere with the lawful authority of the armed forces to take whatever action may be necessary to preserve the health of a servicemember. Evidence or contraband obtained from an examination or intrusion conducted for a valid medical purpose may be seized and is not evidence obtained from an unlawful search or seizure within the meaning of Mil. R. Evid. 311.

As noted by the Court below, "the sole basis offered by the Government for the admissibility of the . . . [evidence] is that it was obtained as a result of an intrusion conducted for a valid medical purpose, as authorized by Mil. R. Evid. 312(f)." 52 M.J. at 508. The Government has not contended that the evidence in question was obtained as a result of any of the other rules

governing probable cause and non-probable cause searches and seizures. See id.

There is no exclusion under the Military Rules of Evidence for members on the TDRL. Mil. R. Evid. 1101(a), entitled "Rules applicable," provides: "Except as otherwise provided in this Manual, these rules apply generally to all courts-martial . . . ." Subsection (d) of that rule, entitled "Rules inapplicable," contains no indication that the Rules are not applicable to persons on the TDRL, nor is there anything elsewhere in the Manual for Courts-Martial that would exempt members on the TDRL from Mil. R. Evid. 312(f).

The court below asserted, however, that the military services do not rely on members on the TDRL to perform military missions. In its view, application of Mil. R. Evid. 312(f) to persons on the TDRL would violate the Fourth Amendment because the rule is not a "needed exception to the Fourth Amendment protections applicable to the general populace based upon military exigencies." 52 M.J. at 510.

We do not agree with the lower court's assessment of the TDRL. The exercise of court-martial jurisdiction over members on the TDRL, as affirmed in Bowie, underscores the continuing military status of a member on the TDRL, even if the member is not then performing regular duties. Court-martial jurisdiction reflects the statutory concept that the TDRL is a "temporary" assignment, not a permanent separation from active duty. Congress expressly denominated status on the TDRL as "temporary" and specifically required members on the TDRL to undergo periodic physical examinations to determine whether each member is "physically fit to perform" military duties. 10 USC § 1210(f).

The statutory requirement that a member consent to return to active duty does not diminish the interest of the military in the member's fitness for duty while on the TDRL. The detailed statutory provisions for return to duty reflect a congressional expectation that servicemembers who are determined to be fit

for duty, and who thereby lose entitlement to retirement pay, may well seek to return to duty after receiving a fitness determination -- whether motivated by patriotism, financial interest, or other considerations. See, e.g., Craft v. United States, 544 F.2d 468, 210 Ct. Cl. 170 (1976) (holding that the service erred in finding unfit for duty a servicemember who sought to return to active duty).

Moreover, even if a member on the TDRL is finally determined to be unfit for duty and is retired for physical disability, the member retains military status and may be recalled to active duty under certain circumstances. See, e.g., Akol v. United States, 167 Ct. Cl. 99 (1964) (wartime needs required recall to active duty of servicemembers who had been retired for physical disability); cf. McCarty v. McCarty, 453 U.S. 210, 222, 69 L. Ed. 2d 589, 101 S. Ct. 2728 (1981) (discussing amenability of non-disability retirees to UCMJ jurisdiction and recall to active duty).

Under the lower court's view of the law, a person on the TDRL observed using an illegal drug could be tried and convicted by court-martial, so long as the prosecution did not rely on evidence obtained under Mil. R. Evid. 312(f). If, however, bodily fluids extracted during a routine medical examination of a person on the TDRL reflected the same or a greater level of drug abuse, the lower court's ruling would preclude prosecution if the only evidence was obtained through a medical examination covered by Mil. R. Evid. 312(f). We do not agree that the Constitution requires such an anomaly. The constitutional considerations that support the exercise of court-martial jurisdiction over a military member on the TDRL -- the receipt of military pay and continuing military status -- are no less significant when it comes to the use of evidence obtained during a valid medical procedure concerning the member's continued fitness for military duty.

In view of the receipt of military pay and the potential for further active duty service by members who are temporarily

removed from active duty by reason of disability, we conclude that evidence obtained in compliance with Mil. R. Evid. 312(f) may be used in a court-martial of a person on the TDRL.

B. Application of Mil. R. Evid. 312(f) to Appellee

The parties appear to agree that insertion of the needle into appellee's arm and extraction of the first vial of blood was undertaken for a "valid medical purpose" and was "necessary to preserve the health of a servicemember." Under the plain language of Mil. R. Evid. 312(f), if some of the blood in the first vial was made available to the NCIS for its investigative purposes, any evidence relating thereto would be admissible.

The prolonged insertion of the needle to extract a second vial of blood, solely for law enforcement purposes, raises a separate question under Mil. R. Evid. 312(f). In United States v. Fitten, 42 M.J. 179 (CMA 1995), our Court unanimously upheld under Rule 312(f) the taking of a second bottle of urine for command investigation purposes when the catheterization and taking of the first bottle of urine was for a medical purpose. We noted that taking the second bottle of urine had only "a de minimis impact by prolonging the flow of urine only long enough to fill the second bottle." Id. at 182. Under the circumstances of a de minimis intrusion, we concluded that the intrusion did not violate the Fourth Amendment or the Military Rules of Evidence.

In any further proceedings in the present case concerning admissibility of the evidence at issue, the military judge will need to determine -- in light of Fitten -- whether the prolonged intrusion of the needle in appellee's arm while a second vial was placed on the vacuum needle, and then for some additional period while the blood was extracted into the vial, was a de minimis intrusion with respect to the Fourth Amendment and Mil. R. Evid. 312(f). In determining whether Fitten permits admission of the evidence at issue, the military judge should include in his consideration the effects of the type of intrusion,

the length of the prolonged insertion, the quantity of fluid extracted, the nature of the fluid extracted, and whether there is a legally significant difference between the nature of the fluid extracted in this case as compared to Fitten (e.g., blood versus urine).

IV. DECISION

The first certified question is answered in the affirmative. Accordingly, the decision of the United States Navy-Marine Corps Court of Criminal Appeals is reversed, and the case is returned to the Judge Advocate General of the Navy for remand to the court-martial for trial on the merits. Upon appropriate motion at such trial, the military judge shall consider the issues raised by the second certified question in light of this opinion.

APPENDIX B

UNITED STATES NAVY-MARINE CORPS COURT OF CRIMINAL APPEALS

UNITED STATES Appellant	) NMCM No. 9900769)
v.	) OPINION OF THE U.S) NAVY-MARINE CORPS) COURT OF CRIMINAL
Walter S. Stevenson Hospital Corpsman Third Class (E-4) U.S. Navy (Retired) Appellee	) APPEALS ON APPEAL) BY THE UNITED STATES)) PUBLISH) Decided 18 October 1999

LT TIMOTHY E. CURLEY, JAGC, USNR, Appellate Government Counsel
LT M. ERIC EVERSOLE, JAGC, USNR, Appellate Defense Counsel
LT OMAR R. LOPEZ, JAGC, USNR, Appellate Defense Counsel

TROIDL, Senior Judge:

On 5 February 1999, a charge alleging that the appellee committed rape on or about 23 November 1992, in violation of Article 120, Uniform Code of Military Justice, 10 U.S.C. § 920 (1994), was referred for trial by a general court-martial. Following arraignment, the appellee filed a motion to suppress "DNA [deoxyribonucleic acid] evidence obtained from an illegal blood seizure." Appellate Exhibit VII. The motion was duly litigated and, on 27 April 1999, the military judge granted the motion. Trial counsel provided timely notice of the Government's intent to appeal the military judge's ruling and the Government subsequently filed a timely appeal under Article 62, UCMJ.

After the Government filed its brief asserting a single assignment of error,[1] the appellee submitted an Answer in which he asserted one additional assignment of error[2] as providing "additional or alternate grounds for affirming the [military judge's] ruling." *United States v. Lincoln*, 42 M.J. 315, 320 (1995)(quoting *Dandridge v. Williams*, 397 U.S. 471, 475-76, n.6 (1970)). The Government subsequently moved to dismiss the additional assignment of error as being outside the jurisdiction of this court. Having carefully considered the record of trial, the Government's Brief, the appellee's Answer, the Government's Reply and Motion, and the superb oral arguments by appellate counsel, we grant the Government's motion to dismiss the additional assignment of error, finding that the statute of limitations does not provide an "additional or alternate" grounds for affirming a suppression ruling. Additionally, we affirm the military judge's ruling suppressing the second tube of blood drawn from the appellee on 6 June 1998, along with any derivative evidence gained therefrom.

Standard of Review

This Court may review the military judge's determinations "only with respect to matters of law." Art. 62(b), UCMJ; RULE FOR COURTS-MARTIAL 908, MANUAL FOR COURTS-MARTIAL, UNITED STATES (1998 ed.). "Reversal of an interlocutory ruling of a military judge can only result where that judge committed an error of law." *United States v. Postle*, 20 M.J. 632, 636

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[1] THE MILITARY JUDGE ERRED IN SUPPRESSING DNA EVIDENCE FROM THE ACCUSED'S BLOOD. SINCE THE ACCUSED WAS A MEMBER OF THE MILITARY ON THE TEMPORARY DISABILITY RETIRED LIST AND HIS BLOOD WAS ALREADY BEING DRAWN FOR A VALID MEDICAL PURPOSE, THE DNA EVIDENCE IS ADMISSIBLE UNDER MIL.R.EVID. 312(f).

[2] THIS COURT MUST DISMISS THE CHARGE OF RAPE WITH PREJUDICE BECAUSE THE STATUTE OF LIMITATIONS FOR THE CRIME HAS EXPIRED.

(N.M.C.M.R. 1985). We are bound by the military judge's determinations of fact unless they are "unsupported by the evidence of record or was clearly erroneous." *United States v. Middleton*, 10 M.J. 123, 133 (C.M.A. 1981). We conduct a *de novo* review of his conclusions of law.

Findings of Fact

We start by adopting findings of fact 1-13 and 15-25, as contained in the military judge's ruling of 27 April 1999, finding that they are supported by the evidence of record and are not clearly erroneous. *Id.* We decline to adopt finding of fact 14, finding no evidence in the record that NCIS was notified in advance that the appellee's "blood would be drawn on 3 June 1998 in connection with a routine medical visit."

The findings of fact reveal that Mrs. [KT], the dependent wife of a Sailor, complained to authorities that she was violently raped at knifepoint in her on-base residence in Hawaii, on 23 November 1992. Blood and semen samples were obtained during a subsequent medical examination of Mrs. [KT]. The petitioner was an active duty petty officer stationed in Hawaii at the time of the attack. The Naval Criminal Investigative Service [NCIS] closed the investigation into the rape of Mrs. [KT] as unresolved in August 1993. In 1994, the petitioner was released from active duty and placed on the Temporary Disability Retired List [TDRL].[3] The Government did not establish the basis for the appellee's assignment to the TDRL during the litigation of this motion.

In November 1997, after reviewing police reports which implicated the appellee as a suspect in a "Peeping Tom" incident that occurred in the vicinity of Mrs. [KT's] residence

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[3] The TDRL is "a list maintained by the CNO [Chief of Naval Operations] or CMC [Commandant of the Marine Corps] of members who are UNFIT FOR DUTY because of physical disability" and "whose disabilities are not yet determined to be stabilized or permanent." Secretary of the Navy Instruction 1850.4C, Part G, ¶ 1044 (Ch-I, 22 Jul 1993) (emphasis in original).

and within the general timeframe of the alleged rape, NCIS reopened the rape investigation. Thereafter, NCIS Special Agent [SA] McNutt, assigned to the NCIS office in Memphis, Tennessee, received a lead from the NCIS office in Hawaii asking him to interrogate the appellee and to ask the appellee to provide NCIS with a sample of his blood.

After learning that the appellee was receiving medical treatment at the Veteran's Administration [VA] Hospital in Memphis, SA McNutt contacted the VA and was allowed to review the appellee's medical records. During this review, SA McNutt learned that the appellee was being treated for diabetes and a mental disorder. Concerned for his safety and that of the appellee, SA McNutt decided it was premature to contact the appellee about the investigation. Instead, SA McNutt obtained the appellee's blood type from the VA and conveyed this information to the NCIS headquarters. Comparison of the appellee's blood type to the information obtained from the blood and semen samples obtained during the 1992 medical examination of Mrs. [KT] did not eliminate the appellee as a suspect in the rape investigation.

Again asked to obtain a specimen of the appellee's blood and recognizing that the appellee received routine treatment at the VA Hospital, which included drawing blood to monitor his diabetes, SA McNutt contacted and requested the assistance of Mr. Ron Dooley, the Regional Counsel for the VA. SA McNutt informed Mr. Dooley that the appellee was a suspect in a rape investigation and asked if NCIS could obtain a specimen of the appellee's blood whenever he might present himself at the VA Hospital in the normal course of his treatment. Stating that the VA routinely provided blood specimen to the police in connection with DUI investigations, Mr. Dooley said that it should be possible for the VA to comply with the NCIS request. However, Mr. Dooley requested that NCIS submit a memo formalizing the requested assistance. The memo, which requested that NCIS be notified the next time the appellee presented to the VA Hospital to have his blood drawn, was

prepared on or about 21 May 1998 and was faxed to the VA Hospital in Memphis on 27 May 1998.

On 3 June 1998, the appellee appeared at the VA Hospital in Memphis for a regularly scheduled medical visit and consented to having blood drawn for the purpose of medical treatment. The medical staff inserted a vacuum needle (with an open end) into the appellee's arm, then affixed a tube to the needle and drew blood for medical purposes. The medical staff then removed the first tube and, within five or six seconds, affixed a second tube to the needle for the sole purpose of obtaining the blood specimen requested by NCIS. After the second specimen had been obtained, the vacuum needle was removed from the appellee's arm.

The appellee's 3 June 1998 visit to the VA Hospital was not instigated by NCIS and NCIS did not have a representative present when either tube of blood was drawn. NCIS was notified of the availability of the blood specimen and secured it from the VA Hospital on 3 June 1998. The specimen was then forwarded to a laboratory for comparison with the forensic evidence obtained from Mrs. [KT].[4] The specimen contained in the second tube was not used for any medical purpose.

The appellee was not aware of the purpose underlying the drawing of the second tube of blood and did not authorize the medical personnel to draw his blood for any purpose other than medical treatment. The Government concedes that the blood drawn into the second tube on 3 June 1998 was not obtained pursuant to a consent search, a search authorization based upon probable cause, or upon probable cause but without a search authorization and under exigent or special circumstances.

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[4] On 4 August 1998, the laboratory reported that the DNA profiles developed from the November 1992 forensic evidence were attributable to Mrs. [KT], the appellee, and one unknown individual.

On 9 October 1998, the Secretary of the Navy authorized the trial of the petitioner, as a retiree, for the rape of Mrs. [KT]. The appellee was apprehended on 17 December 1998 and ordered into pretrial confinement. A single specification alleging that the petitioner raped Mrs. [KT] was referred by Commander, Navy Personnel Command, for trial by general court-martial on 5 February 1999. The petitioner was arraigned on 17 February 1999. On 18 March 1999, the petitioner moved to suppress the second tube of blood drawn at the VA hospital on 3 June 1998. Appellate Exhibit VII. After the filing of the Government's Response and the appellee's Reply thereto (Appellate Exhibits VIII and IX), an Article 39(a), UCMJ, session was held on 24 March 1999, during which evidence on the motion was presented. Record at 1-45. On 27 April 1999, the military judge granted the appellee's motion, suppressing the vial of blood and any derivative evidence gained therefrom, ruling that Military Rule of Evidence 312(f), MANUAL FOR COURTS-MARTIAL, UNITED STATES (1998 ed.) was inapplicable in this case and that the search and seizure violated both the Fourth and Fifth Amendments to the Constitution.

The Government thereafter filed a timely notice of appeal of the military judge's ruling.[5] On appeal, the Government

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[5] Following the Government's filing of its Notice of Appeal, the appellee filed a Motion for Appropriate Relief with the trial military judge requesting review of his continued pretrial confinement. After the military judge ruled that he did not have the authority to hear the motion during the pendency of the appeal, the appellee petitioned us for a *Writ of Habeas Corpus* or, in the alternative, a *Writ of Mandamus*. We recently denied the petition for a *Writ of Habeas Corpus*, but issued a *Writ of Mandamus* in which we ordered the military judge to review the propriety of the appellee's continued pretrial confinement. In our order, we held that:

> Having considered the evolution of R.C.M. 908(b)(4)(A) and (b)(9), we find that the military judge was incorrect in concluding that he was barred from hearing the petitioner's request for release from confinement pending the

asserts that the military judge abused his discretion in suppressing the evidence at issue, his ruling having been based upon an erroneous understanding of the law. The appellee argues that the Military Rules of Evidence do not apply in this case, that the search and seizure violated the Fourth Amendment, and would have us affirm the military judge's suppression ruling.

Applicability of the Military Rules of Evidence

Preliminarily, we find that the Military Rules of Evidence do apply in this case, as they do in every court-martial. *See* MIL. R. EVID. 101 and 1101. We also agree with the military judge that the extra tube of blood was drawn by VA medical

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Government appeal. Although R.C.M. 908(b)(4)(A), both as originally drafted and subsequently amended, precludes sessions of court pending resolution of the appeal as to matters related to the offense(s) impacted by the military judge's ruling, we find that the review of an individual's pretrial confinement status does not impact the charges and specifications pending resolution of the appeal. As we stated in *Frage v. Edington*, 26 M.J. [927] at 928, 'under normal circumstances, the decision whether to confine an accused during the pendency of a Government appeal rests within the discretion of the convening authority and the military judge in accordance with the guidelines set forth in R.C.M. 305(d).' R.C.M. 908(b)(9) does not change this view, since it merely tells the accused's commander what factors he should consider in deciding whether or not to continue pretrial confinement during the pendency of an appeal. We find that this subsection does not explicitly preclude action by the military judge and, since it is modeled after 18 U.S.C. § 3143, it implicitly seeks to ensure that an accused in pretrial confinement pending a Government appeal is in the same position as any other pretrial detainee, to include review by a military judge in accordance with R.C.M. 305(j).

Stevenson v. Krantz and Hinkle, No. 9900769 (N.M. Ct. Crim. App. 27 Aug 1999) (unpublished order) (footnotes omitted).

personnel solely in response to the memorandum from NCIS, and thus they acted as agents for NCIS when they performed that procedure. As a result, the search and seizure of the second tube of blood was "conducted, instigated, or participated in by" military personnel or their agents and the search or seizure is unlawful if "in violation of the Constitution of the United States as applied to members of the armed forces, an act of Congress applicable to trials by court-martial that requires exclusion of evidence obtained in violation thereof, or Mil.R.Evid. 312-317." MIL. R. EVID. 311(c)(1).

Both the Fourth and Fifth Amendments provide protections in the area of searches and seizures and are generally applicable to the military absent, a showing of a need for variation based upon military exigencies. *Murray v. Haldeman*, 16 M.J. 74, 81 (C.M.A. 1983)(quoting *United States v. Middleton*, 10 M.J. 123, 127 (C.M.A. 1981)); *see also United States v. Fitten*, 42 M.J. 179, 180 (1995). The Fourth Amendment provides:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

Compliance with the Due Process Clause of the Fifth Amendment is an issue when a search or seizure is conducted in such a way that it does "more than offend some fastidious squeamishness or private sentimentalism about combating crime too energetically" but rather "is conduct that shocks the conscience." *Rochin v. California*, 342 U.S. 165, 172 (1952).

The Supreme Court has been particularly sensitive to cases involving bodily intrusions, stating in *Schmerber v. California*, 384 U.S. 757 (1966), that "the Fourth Amendment's proper function is to constrain not all intrusions as such, but against

intrusions which are not justified in the circumstances." The Court went on to write that the "interests in human dignity and privacy which the Fourth Amendment protects forbid any such intrusions on the mere chance that the desired evidence might be obtained." *Schmerber*, 384 U.S. at 770.

Against this backdrop, Section III of the Military Rules of Evidence established exclusionary rules and related matters concerning self-incrimination, search and seizure, and eyewitness identification. Of interest in this case are Rules 311 through 316. The appellee, having made a timely motion to suppress [Mil.R.Evid. 311(a)(1)] and having an adequate interest in both his person and in the blood seized [Mil. R. Evid. 311(a)(2)], the burden is on the Government to establish, by a preponderance of the evidence, that the appellee's blood was not obtained as a result of an unlawful search and seizure. MIL. R. EVID. 311(e).

The Government concedes that the search and seizure in this case was not accomplished pursuant to a search authorization and we concur with the military judge that the evidence presented by the Government did not amount to probable cause. MIL. R. EVID. 315 and 316. Additionally, as conceded by the Government, the second tube of blood was not obtained based upon the consent of the appellee, or upon any of the other available searches not requiring probable cause as enumerated in Mil. R. Evid. 314. The sole basis offered by the Government for the admissibility of the second tube of blood and the derivative evidence obtained therefrom is that it was obtained as a result of an intrusion conducted for a valid medical purpose, as authorized by Mil. R. Evid. 312(f).[6]

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[6] Mil. R. Evid. 312(f) reads as follows:

Intrusions for valid medical purposes. Nothing in this rule shall be deemed to interfere with the lawful authority of the armed forces to take whatever action may be necessary to preserve the health of a servicemember. Evidence or contraband obtained from an examination or intrusion conducted for a valid medical purpose may

Mil. R. Evid. 312(f)

The military judge ruled that Mil. R. Evid. 312(f) "is limited in scope and should be narrowly construed to apply only to members of the 'active duty' armed forces." Ruling on the Motion to Suppress of 27 April 1999, Discussion, P 6. He went on to restate his holding, albeit somewhat differently, in his summation, stating that Mil. R. Evid. 312(f) was "inapplicable to retired servicemembers on [the] TDRL list, at least to the extent that the medical examination or intrusion was conducted for purposes other than ascertaining the status of a member's medical condition vis--vis return to an active duty status." *Id.* at P 8a. The military judge also held that the search and seizure in this case violated the appellee's rights under both the Fourth and Fifth Amendments to the Constitution.

Mil. R. Evid. 312(f) seeks to make reasonable, within the context of the Fourth Amendment, the search for and seizure of evidence obtained from a bodily intrusion conducted for a valid medical purpose without a search authorization or probable cause. The reason cited as providing the foundation for the rule is the lawful authority of the armed forces to take whatever action is necessary to preserve the health of a servicemember. This Rule is without parallel in the Federal Rules of Evidence and recognizes the special needs of the armed forces. We accept that the armed forces have a valid need to be able to take actions necessary to preserve the health of active duty servicemembers, all of whom are counted upon to ensure the military is able to carry-out its mission in peacetime or during periods of armed conflict. Accordingly, unlike the civilian populace, active duty servicemembers capable of making health care decisions related to their own bodies may be required to accept medical treatment believed by their superiors to be necessary to preserve their health even over objections and without judicial intervention. *See United*

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be seized and is not evidence obtained from an unlawful search or seizure within the meaning of Mil.R.Evid. 311.

States v. Fitten, 39 M.J. 659, 661, 676-77 (N.M.C.M.R. 1993), *aff'd*, 42 M.J. 179 (1995). As was the case in *Fitten*, even if this medical treatment involves an intrusion into the body, so long as it is conducted for a valid medical purpose, by individuals with appropriate medical qualifications, and in an appropriate medical setting, the intrusion will not amount to an unreasonable search and seizure in violation of the Fourth Amendment. Additionally, if the intrusion itself does not shock the conscience, there is no violation of the Due Process Clause of the Fifth Amendment.

The plain language of Mil. R. Evid. 312(f) does not limit its applicability to active duty servicemembers. Unlike the military judge, we will not look behind the plain meaning of this language in an attempt to discern whether the President intended the rule to apply to members of the TDRL. *See United States v. Leonard*, 21 M.J. 67, 69 (C.M.A. 1985); *United States v. Ferguson*, 40 M.J. 823, 830 (N.M.C.M.R. 1994). We must, however, determine whether application of the rule to members of the TDRL would be "in violation of the Constitution." MIL. R. EVID. 311(c)(1).

In making this determination, we look to both the statutes governing retirement or separation from the armed forces by reason of physical disability, to include assignment to the TDRL, and the Navy policy implementing those statutes. 10 U.S.C. §§ 1201-1221 (1999); Secretary of the Navy Instruction 1850.4C (Ch. 1, 22 Jul 1983). In administering the TDRL for the Navy, the Chief of Naval Personnel is tasked with maintaining an accurate accounting of authorized members, designating medical facilities and directing members to undergo periodic physical examinations, and monitoring failures to report to the required examinations. SECNAVINST 1850.4C at Enclosure (7), ¶ 7002. Individuals on the TDRL are required to maintain a current address with the Finance Center and submit to periodic physical examinations ordered by the Chief of Naval Personnel. *Id.* at ¶¶ 7003 and 7005. If an individual fails to comply with an order for a physical examination, the

Chief of Naval Personnel may either accept a substitute examination, or take a series of actions starting with a stoppage in pay, followed by administrative removal from the TDRL and ultimately the administrative discharge of the individual. *Id.* at ¶¶ 7006 and 7008; 10 U.S.C. § 1210(a). Enlisted members of the TDRL who submit to the periodic examinations and are found fit for duty, cannot be ordered back to active duty without their consent and even then only if they are otherwise qualified for reenlistment. SECNAVINST 1850.4C. at Enclosure (7), ¶7019; 10 U.S.C. § 1211.

Based upon the statutes and policy guidance governing the TDRL, we find that: 1) the armed forces do not rely upon members of the TDRL to carry-out their mission even though they remain servicemembers and are subject to both the UCMJ and trial by court-martial; 2) the armed forces do not have the same need to be able to take actions necessary to preserve the health of members of the TDRL as they have for active duty servicemembers; 3) members of the TDRL are not subject to involuntary medical treatment believed to be necessary to preserve their health to any extent greater than the general populace; and, 4) there is no showing that the application of Mil. R. Evid. 312(f) to members of the TDRL is a needed exception to the Fourth Amendment protections applicable to the general populace based upon military exigencies. Applying the Fourth Amendment to the facts in this case and in view of the inapplicability of Mil. R. Evid. 312(f) to the appellee, we find that the search and seizure conducted in this case was unreasonable.

Accordingly, we find that the military judge was correct in his ruling that Mil. R. Evid. 312(f) is not applicable to members of the TDRL and that the search and seizure in this instance was unreasonable, thus violating the Fourth Amendment. We do not find, however, a violation of the appellee's rights under the Due Process Clause of the Fifth Amendment.

Disposition

We affirm the military judge's ruling suppressing the specimen of blood drawn for NCIS on 6 June 1998 and any derivative evidence gained therefrom. We return the record for a trial on the merits.

Senior Judge LEO and Judge ANDERSON concur.

Appendix C

GENERAL COURT-MARTIAL
SOUTHEAST JUDICIAL CIRCUIT
NAVY-MARINE CORPS TRIAL JUDICIARY

UNITED STATES	)	**RULING**
	)	
V.	)	**(MOTION TO SUPPRESS**
	)	**EVIDENCE)**
WALTER S. STEVENSON	)	
HM3, USN (Retired)	)	**27 April 1999**
308-70-4093	)	

Preliminary Statement: The defense has asked the Court to suppress DNA evidence allegedly obtained as a result of an illegal blood seizure of the accused

Findings of Fact:

1. Kari Thiele was allegedly raped at her on-base residence in Hawaii on 23 November 1992.

2. Medical staff at Tripler Army Medical Center performed a rape kit on Ms. Theile. Blood and semen samples were obtained.

3. The investigation into the alleged rape was closed as unresolved in August 1993 by the Naval Criminal Investigative Service (NCIS).

4. The accused was on active duty serving as a member of the Navy at the time of the alleged rape. He was discharged from active duty and placed on the temporary disabled retired list (TDRL) in 1994.

5. Sometime thereafter, review of police reports revealed that the accused had been implicated as a possible "Peeping Tom" near the area of the Thiele residence within the general time

frame of the alleged rape. With this new information, the investigtion of the Thiele rape was reopened by NCIS in November 1997.

6. Special Agent John McNutt, of NCISA Memphis, received a lead from Hawaii asking that he interrogate the accused and request a permissive authorization for the search and seizure of the accused's blood.

7. Special Agent McNutt learned that the accused was receiving medical treatment for diabetes at the Veterans Administration Hospital located in Memphis, Tennessee. He reviewed the accused's medical records, which revealed the accused was being treated for Schizophrenia and diabetes. The accused had apparently been admitted as a patient for suicidal/homicidal ideation. The accused was later released to outpatient status as the investigation progressed.

8. NCIS determined that for the safety of the agent and accused, it would be premature to seek a permissive authorization from the accused for the search seizure of his blood. NCIS was also aware the accused was on medication. No attempt was made to obtain a sample of the accused's blood.

9. NCIS obtained the accused's blood type was forwarded to NCIS headquarters for comparison with blood and semen samples obtained during the rape kit examination of Ms. Thiele at Tripler Army Medical Center in 1992. The blood type comparison did not eliminate the accused as a suspect in the rape.

10. Special Agent McNutt was requested to obtain a sample of the accused's blood. He was aware the accused routinely presented to the VA hospital to have his blood drawn and monitored in order to regulate diabetic medications. He contacted Ron Dooley, regional counsel for the VA hospital for assistance.

11. Mr. Dooley was asked if NCIS could get a sample of the accused's blood whenever the accused might present to the VA hospital in the normal course of his diabetes treatment evaluation. Mr. Dooley was informed of the accused's status as a suspect in a rape investigation.

12. Special Agent McNutt testified that Mr. Dooley indicated blood samples were provided to civilian police agencies in connection with DUI investigations, so it should be possible to provide a blood sample of the accused to NCIS. He requested NCIS furnish a memo to the VA hospital requesting the same.

13. The memo was prepared on or about 21 May 1998 and faxed to the VA hospital on or about 27 May 1998. The memo asked that NCIS be notified the next time the accused presented to the VA hospital to have his blood drawn.

14. NCIS received a phone call from the VA hospital notifying them that the accused's blood would be drawn on 3 June 1998 in connection with a routine medical visit.

15. Blood was drawn from the accused by hospital staff of the VA hospital Memphis on 3 Jun 1998. This was accomplished by inserting a vacuum needle (with an open end) into the accused's arm. While this needle was in his arm, one tube of blood was drawn for treatment and diagnosis of his diabetes. This initial tube was removed from the vacuum needle and replaced within five or six seconds with a second tube. The second tube was used by hospital staff to obtain a separate blood sample for NCIS. When the second tube was filled, hospital staff removed the needle from the accused's arm. The same vacuum needle was in the accused's arm during the entire time both tubes were filled.

16. NCIS was not present when either tube of blood was drawn, and had made no arrangements to have the accused present on a particular day to have his blood drawn. NCIS did not instigate or participate in the drawing of the initial tube of blood.

17. The initial tube of blood drawn on 3 June 1998 occurred during a normally scheduled medical visit and was drawn for medical purposes to monitor the accused's diabetes.

18. The second tube of blood drawn on 3 June 1998 was drawn solely for law enforcement purposes at the request of NCIS and was not drawn for any medical purpose.

19. NCIS seized the second tube of blood and sent it to the U.S. Criminal Investigative Laboratory for DNA comparison with the forensic evidence associated with the 1992 rape of Ms. Thiele.

20. The VA hospital staff obtained the accused's consent to draw blood for medical purposes. The VA hospital staff did not, however, tell the accused that a second tube of blood would be drawn solely for forensic purposes for use in the Thiele investigation, nor did he give consent for a second tube of blood to be drawn for that purpose.

21. The government never sought consent from the accused to draw a sample of his blood for law enforcement purposes. The second tube of blood drawn was not done pursuant to a consent search. The government conceded during the motion session that the second tube of blood was not done pursuant to a consent search.

22. The second tube of blood was not done as part of a search authorized upon probable cause. The government conceded during the motion session that the second tube of blood was not done as part of a search authorized upon probable cause.

23. The second tube of blood drawn was not done as part of a search upon probable cause without authorization, but under exigent or special circumstances. The government conceded during the motion session that the second tube of blood was not done as part of a search authorized upon probable cause without authorization, but under exigent or special circumstances.

24. The accused has not been ordered to active duty, but remains in a TDRL retired status. Jurisdiction over him is asserted pursuant to 10 U.S.C., section 802(a)(4). He is currently in pretrial confinement in the Naval Pretrial Confinement Facility on board Naval Air Station, Pensacola.

25. In sum,

a. The accused presented to the VA hospital for medical treatment.

b. The VA hospital staff had a duty to follow generally accepted standards of medical care in evaluating his medical condition.

c. The VA hospital staff obtained the consent of the accused to make a needle intrusion to draw blood necessary to do blood monitoring for his diabetic condition. A single needle intrusion was used to withdraw two tubes of blood.

d. The first tube of blood drawn was done so for a valid medical purpose and was done with the accused's consent. This tube of blood was *not* seized by NCIS.

e. The second tube of blood drawn was done so without the consent of the accused, exceeded the accused's informed consent as to its medical purpose, was not done with "informed" consent as to it law enforcement purpose, and was not drawn for a valid medical purpose.

f. The second tube of blood would not have been drawn "but for" the request made to the VA hospital by NCIS.

Discussion:

1. The needle intrusion was done "primarily for medical reasons," and was accomplished in a hospital setting by medical personnel following receipt of the accused's informed consent as to its medical use. No question as to the appropriateness of that intrusion would exist absent the drawing of the second tube of blood.

2. The second tube of blood was not drawn as an afterthought, but rather was within the scope of the procedure contemplated before the needle was inserted through the skin. In this respect, the needle intrusion was *not* done with the accused's "informed" consent, was not done for a valid medical purpose, and was therefore nonconsensual.

3. No medical purpose was served by drawing the second tube of blood. The VA hospital staff was engaged in action instigated by and solely for the benefit of law enforcement when the second tube of blood was drawn. In essence, the hospital staff was acting as a servant or agent of NCIS at that moment when the second tube of blood was drawn. M.R.E. 311(a). The prosecution has the burden of proving by a preponderance of the evidence that the evidence was not obtained as a result of an unlawful search or seizure. M.R.E. 311(e).

4. Evidence obtained as a result of an unlawful search and seizure made by a person acting in a governmental capacity, is inadmissible against an accused, if the accused makes a timely objection and the accused has a reasonable expectation of privacy in the person to be searched. M.R.E. 311(a). The prosecution has the burden of proving by a preponderance of the evidence that the evidence was not obtained as a result of an unlawful search or seizure. M.R.E. 311(e).

5. The Government proffers M.R.E. 312(f) as their sole basis for asserting the admissibility of the DNA blood derivative evidence. In support of their argument they point to *United States v. Finan*, 39 M.J. 659 (N.M.C.M.R. 1993), aff'd, 42 M.J. 179 (1995). In their view, if the intrusion of the needle through the skin was for a proper medical purpose, M.R.E. 312(f) permits the blood extracted, to be used for any purpose, including law enforcement purposes. But the facts of this case differ in certain important respects:

a. The accused was on the TDRL list; he was not on active duty.

b. The intrusion occurred at a VA hospital; it did not occur at a military medical treatment facility.

c. The intrusion was not accomplished to ensure his "fitness for duty" in any respect. M.R.E. 312(f).

d. The intrusion was not time-sensitive required for treatment or diagnosis. Delay to obtain a warrant or authorization based on probable cause implicated no concerns that evidence might disappear or be destroyed.

e. Probable cause to believe the accused's blood might contain evidence of a crime did not exist. "Humman dignity and privacy which the Fourth Amendment protects forbid any such intrusions on the mere chance that desire evidence might be obtained." *Schmerber v. California*, 384 U.S. 757, at 770, 86 S.Ct. 1826, 16 L.Ed.2d (1966).

f. The needle intrusion was accomplished for a duel medical/law enforcement purpose; in *Fitten*, the catheter was inserted solely for medical purpose. 42 M.J. at 180 and 39 M.J. at 662. The catheter was not inserted at the request of law enforcement or was otherwise related to the existence of a search and seizure authorization.

g. The "seizure" of the tube of blood was not accomplished under a search authorization; in contrast, in *Fitten*, the urine specimen sample was "obtained" following notification to medical authorities of the existence of a search and seizure authorization. 39 M.J. 659, at 662.

h. Consent was obtained by **misrepresenting** the purposes for which the blood would be drawn; in contrast, in *Fitten*, the accused was forthrightly asked by the command's chief investigator/urinalysis coordinator to provide a urine sample for non-medical use.

i. Blood is not bodily waste, unlike urine, which will necessarily be discharged with time.

6. This Court holds M.R.E. 312(f) is limited in scope and should be narrowly construed to apply only to members of the "active duty" armed forces. The following general comments are noted:

a. With respect to the government's M.R.E. 312(f) argument, the defense has submitted an affidavit for the Court's consideration from the primary author of the search and seizure aspects of the Military Rules of Evidence. The Court treats the views contained in the affidavit as it might consider any learned treatise.

b. The Court advises the parties that it contacted an outside expert, Professor David Schlueter, of St. Mary's University and a co-author of the Military Rules of Evidence Manual, in an effort to gain his views on this interesting issue. Professor Schlueter appropriately advised the Court that he had previously reviewed and provided comment to the defense team on a draft of their suppression motion. As a result, the conversation between the Court and Professor Schlueter did not encompass a substantive exchange of comment with him on this issue.

c. Although what has transpired and been argued in this case by the government may not have been contemplated by the drafters of M.R.E. 312(f), it is not unusual that unanticipated results occur whenever legislation is passed or Executive Orders are signed. The question is -- did the President intent that M.R.E. 312(f) be interpreted to apply to members of the military services serving in a retired status. This Court believes not.

d. The Analysis to Section III of the Military Rules of Evidence states various Rules thereunder, which would include M.R.E. 312(f), have no counterpart under the Federal Rules of Evidence as they reflect a codification of law relating to search and seizure. As such, those particular Rules represent something more than mere rules of procedures governing the conduct of courts-martial. The Court believes extreme care

must be used when applying them to court-martial proceedings.

e. An accused in TDRL status is subject to personal jurisdiction under the UCMJ. See, UCMJ Article 2(a)(4). He is also subject to court-martial jurisdiction for offenses committed while in that status. See, UCMJ Article 3(a). But, an accused on the TDRL may not be referred to court-martial absent prior Secretary of the Navy approval. The limitation by imposed by the Secretary of the Navy implicitly demonstrates a difference in perspective when contemplating disciplinary action involving members of the active duty force as contrasted with members of the retired force. It makes sense that persons in a military status other than active duty, e.g., retired and reserve members, might be afforded more protections than those on active duty.

f. Similarly, jurisdiction under the Uniform Code of Military Justice is not unlimited. ("It has never been intimidated by this Court, however, that Article I military jurisdiction could be extended to civilian ex-soldiers who had severed all relationship with the military and its institutions", *Thoth v. Quarles*, 76 S.Ct. 1 (1955)). *Toth* does not bar prosecution of this accused. *Toth*, however, highlights the difference in protections afforded members of our military services and our civilian counterparts.

7. The nonconsensual law enforcement aspect of the intrusion was done without probable cause, without a search warrant or authorization, and without exigent-circumstances, and was done under the auspices — albeit not lawful authority — of the armed forces. In effect, the nonconsensual aspect of the intrusion was bootstrapped onto a valid medical procedure in an attempt to make lawful that which would not otherwise standing alone be lawful. It may be that in some circumstances persons on the TDRL list may be ordered to submit to physical examination which includes blood tests to determine their

eligibility to remain on TDRL vice returning to active duty, but this is not one of those instances.

8. In sum:

a. The court holds M.R.E. 312(f) is inapplicable to retired servicemembers on TDRL list, at least to the extent that the medical examination or intrusion was conducted for purposes other than ascertaining the status of a member's medical condition vis-a-vis return to an active duty status. In this respect the Court notes the defense brief glosses over the distinction in status between members on the TDRL and other retired personnel. Persons are placed on the TDRL as their disabling medical condition may very well improve to permit a return to an active duty status. Although the Court has not researched this issue, it is the Court's understanding that persons placed on the TDRL, for a period of five years, are periodically required to report to appropriate military medical authority for evaluation of their fitness for duty.

b. The Court holds the search encompassed by the insertion of the needle and seizure of the second tube of blood violated the accused's Fourth Amendment right to be free from unreasonable search and seizures.

c. The Court holds the search encompassed by the insertion of the needle and seizure of the second tube of blood violated the accused's Due Process Rights under the Fifth Amendment. At the instigation of the Naval Criminal Investigative Service, a second tube of blood drawn for law enforcement purposes was bootstrapped onto an otherwise valid medical procedure in an attempt to make lawful that which would not otherwise standing alone be lawful. The "informed consent" for this procedure misrepresented the purposes for which the blood drawn would be used. Although the setting, personnel, and procedures used to conduct the actual intrusion involved presumably all reasonable precautions; involved virtually no risk, trauma, or pain involved no unusual or untested procedures; and were in all respects

consistent with the routine intrusion required for monitoring the accused's blood to regulate his diabetic medications — the medical personnel chose not obtain the accused "informed" consent for this procedure, which would have included informing the accused of the duel purpose for which the blood was to be drawn. The Naval Criminal Investigative Service used the VA hospital medical personnel to accomplish indirectly what they could not lawfully accomplish directly. It is not inconceivable that the accused might have a claim against the United States under the Federal Torts Claim Act for damages suffered by him by virtue of the VA hospital's negligence in providing informed consent as to this needle intrusion.

Ruling:

1. The defense motion to suppress evidence is granted.

2. This suppression ruling is limited to the second tube of blood drawn and any derivative evidence gained therefrom. The precise item of evidence, which the defense seeks to suppress was not offered into evidence at the motion session. See, *United States v. Fitten*, 39 M.J. 659 (Judge Mollison's comments on a similar issue at page 670).

3. The Court is mindful of the significance of this ruling.

RAYMOND J. KREICHELT
CAPT, JAGC, USN
CIRCUIT MILITARY JUDGE

Appendix D

United States Court of Appeals for the Armed Forces
Washington, D.C. 20442-0001

UNITED STATES, Appellant	)	USCA Misc. Dkt. No. 00-6001/NA
	)	Crim. App. Dkt. No.
v.	)	99-0769
	)	
Walter S. STEVENSON (308-70-4093), Appellee	)	ORDER

On consideration of appellee's petition for reconsideration of the opinion of the Court reported at 53 M.J. 257 (2000), it is, by the Court, this, 31st day of August, 2000,

ORDERED:

That said petition is hereby denied.

For the Court,

/s/Thomas F. Granahan
Clerk of the Court

cc: The Judge Advocate General of the Navy
Counsel for Appellant (EVERSOLE)
Counsel for Appellee (CURLEY)